Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

APRIL TERM, 1995

SEAN JONES, *et al.*,

Petitioners,

v.

REGGIE WHITE, *et al.*,

Respondents;

NATIONAL FOOTBALL LEAGUE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Federal Rule of Civil Procedure 23(b)(1) permits the certification of a mandatory, non-opt-out settlement class terminating the separate claims of non-named absent class members seeking substantial individual money damages. *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985); *Brown v. Ticor*, 982 F.2d 386 (9th Cir. 1992).

2. Whether the certification of a mandatory, non-opt-out settlement class under Federal Rule of Civil Procedure 23(b)(1) which terminated the separate claims of non-named absent class members seeking substantial individual money damages violated constitutionally protected minimum due process rights. *Shutts*, 472 U.S. 797; *Ticor*, 982 F.2d 386.

3. Whether certain Petitioners' constitutional due process rights were violated by the Eighth Circuit's finding that Petitioners were subject to the jurisdiction of the District of Minnesota, where Petitioners made only a special, limited appearance for the purpose of objecting to the certification of the mandatory class. *Ticor*, 982 F.2d 386; *In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989), *cert. denied*, 493 U.S. 821 (1989).

4. Whether in a class action involving substantial individual money damages, a finding that a non-named, absent class member is "subject to the jurisdiction of the court," even if sustainable, is dispositive of that absent class member's right to opt out of the class action settlement under a correct interpretation of Federal Rule of Civil Procedure 23(b)(1). *Shutts*, 472 U.S. 797; *Ticor*, 982 F.2d 386.

5. Whether in a class action involving substantial individual money damages, a finding that a non-named, absent

class member is "subject to the jurisdiction of the court," even if sustainable, is dispositive of that absent class member's constitutional due process right to opt out of the class action settlement. *Shutts*, 472 U.S. 797; *Ticor*, 982 F.2d 386.

6. Whether the Eighth Circuit erred in affirming the order of the Minnesota District Court asserting jurisdiction over putative absent class members even though it failed to observe minimum constitutional due process requirements and to properly apply Federal Rule of Civil Procedure 23 insofar as the Stipulation and Settlement was not fair, adequate and reasonable and the absent, unnamed class members were not adequately represented. *Shutts*, 472 U.S. 797; *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982); *Ticor*, 982 F.2d 386.

7. Whether the Eighth Circuit erred in affirming the order of the Minnesota District Court which enjoined petitioners from taking any action in any other federal district court where they had pending actions or could bring actions, so as to effectively preclude collateral review of the unlawful, mandatory settlement. *Shutts*, 472 U.S. 797 (1985); *Croyden Assoc. v. Alleco Inc.*, 969 F.2d 675 (8th Cir. 1992), cert. denied sub nom. *Harry and Jeanette Weinberg Foundation Inc. v. Croyden Assoc.*, 113 S.Ct. 1253 (1993); *Ticor*, 982 F.2d 386.

8. Whether the Eighth Circuit erred in affirming the order of the Minnesota District Court which held petitioner Leslie O'Neal in contempt of court because he filed a status report in the Federal District Court for the Central District of California where his individual suit was pending, informing the California Court of the purported mandatory settlement and the Minnesota Court's attempt to preclude collateral review of the unlawful, mandatory settlement. *Shutts*, 472 U.S. 797; *Croyden*, 969 F.2d 675; *Ticor*, 982 F.2d 386.

9. Whether the Minnesota District Court erred in certifying the White class exclusively under Rule 23(b)(1) when the relief sought involved substantial individual money damages which can only be certified under Rule 23(b)(3), rather than certifying the non money damages claims only under Rule 23(b)(1) and the money damages claims under Rule 23(b)(3). *Shutts*, 472 U.S. 797; *Ticor*, 982 F.2d 386.

PARTIES IN THIS PROCEEDING

The petitioners in this proceeding, Sean Jones, Leslie O'Neal, Eric Allen, Cris Dishman, William Mathews, and Van Waiters, are NFL football players and are unnamed, absent class members/objectors/plaintiffs-in-intervention in the purported settlement class approved by the District Court.[1]

Respondents/defendants National Football League ("NFL") are the 28 NFL Football teams and the NFL league office which constitute the NFL, Inc.

Respondents/plaintiffs Reggie White, et al. are the class representatives of the purported settlement class approved by the District Court.

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[1]All petitioners except Van Waiters lack minimum contacts with the District of Minnesota. Mr. Waiters played for the Minnesota Vikings and does not contest traditional, personal jurisdiction based on the minimum contacts doctrine. However, Mr. Waiters does challenge the jurisdiction of the court to impose a mandatory class settlement involving substantial money damages over the objection of an unnamed, absent class member.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Eighth Circuit in *White v. NFL*, No. 93-3375MN, 93-3381MN, 93-3382MN, 93-3403MN, and 93-3415MN, entered December 6, 1994. Petitioners in this proceeding are professional football players asserting substantial antitrust damage claims against the National Football League and its member teams in cases pending in the Federal District Courts for the Central District of California (hereinafter "California actions")[2]

Before Petitioners' cases came to trial, another small group of NFL players tried a consolidated action in the Federal District Court for Minnesota alleging essentially the same antitrust violations and type of damages as petitioners. *McNeil, et al. v. National Football League*, Civ. Nos. 4-87-917, 4-90-476 (D.Minn.). Petitioners and the NFL defendants stipulated to stay the California Actions pending the verdict in Minnesota. This trial resulted in a verdict for the players, with a specific finding of antitrust violations. *McNeil v. NFL*, 1992-2 Trade Cas. (CCH) paragraph 69,982, at 68,769 (D.Minn. 1992)(Special verdict form). Petitioners were preparing to move for the stay to be lifted in Los Angeles so they could proceed with their individual lawsuits when a purported mandatory class action settlement was announced in Minnesota. Petitioners first learned of the mandatory non opt-out settlement when they received notice of a so-called fairness hearing in Minnesota. Petitioners made a

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[2]All petitioners except Cris Dishman and Van Waiters have actions pending. For petitioners Dishman and Waiters, the filing of their actions was stayed by the class action settlement, and their statutes of limitations are tolled.

special appearance in order to challenge the settlement on a number of grounds, but principally because it purported to cut off petitioners' individual rights to seek substantial money damages over their objection. [3]

Despite persuasive and controlling authority stating that both the Federal Rules and the Constitution prohibit the elimination of an individual's right to control separate litigation when substantial money damages are at issue, the District Court certified the mandatory class on the grounds that the benefits to the entire class justified the elimination of individual rights, and because the settlement purportedly was necessary to promote professional football. The District Court certified this class notwithstanding the absence of even one case authorizing such a class under the federal rules, and in contradiction to express United States Supreme Court authority guaranteeing the fundamental right of the individual to control his own lawsuit when money damages are the requested remedy. *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985); *Hansberry v. Lee*, 311 U.S. 32 (1940).

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[3]The mandatory settlement in *White*, compensates some mediocre players well, but pays pennies on the dollar to high end players such as petitioners. The parties negotiating the settlement recognized that the deal was unacceptable for certain players. Players who were separately (as opposed to simply being members of the class) represented by counsel for the class, even those who were not named class members received preferential, side deals and were not forced to take the lesser payments under the mandatory settlement. For example, Marcus Allen would have received at the most $245,000 under the settlement paid out over five years. His separate settlement was $1,876,612. See Appendix ("App.") at pp. 14-15, 232-34.

Petitioners appealed the District Court's order to the Eighth Circuit. Ninth Circuit authority holding that a mandatory class was impermissible under the Constitution when money damages were sought was of course cited to the Court. *Brown v. Ticor*, 982 F.2d 386 (9th Cir. 1992). Furthermore, the serious threat to traditional, non-class action litigation, where the rights of the individual historically have been protected and sacred, if a small group of class members and class counsel race to the courthouse and certify preclusive, mandatory class actions was made clear. This Court's expressed concern about the possible misuse of class actions and the necessary limits to expediency arguments in light of due process considerations was cited. See, *e.g.*, *Ticor Title Ins. Co. v. Brown*, ___ U.S. ___, 114 S.Ct. 1359 (1994)(withdrawing cert.)

Petitioners requested that even if the Eighth Circuit was convinced that traditional litigation and the individual right to chose independent counsel and pursue a separate lawsuit had to be sacrificed to other interests, that the rationale be clearly articulated and the policy choice defined for review by this court. The Eighth Circuit declined this challenge, stating that it did not reach the issue because the District Court had jurisdiction over petitioners. Opinion, App. at p. 14.

Of course, the Eighth Circuit of necessity made the de facto decision that the Federal Rules and the Constitution permit the termination of individual property rights when money damages are in issue, if only a mandatory class action is certified. Valid objections were made to the settlement at every possible level, on the basis that it included substantial money damages and various class members wrongfully were prevented from excluding

themselves from the class.[4] Whether the Eighth Circuit chooses to say so or not, it held that a mandatory class involving substantial individual money damages is permitted by Rule 23 and does not offend the Constitution. This result had to be reached in order to sustain the settlement, even if the Eighth Circuit could not justify or explain the result.[5]

The Eighth Circuit's ruling in *White* not only violates the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution, it directly conflicts with the holding of the Ninth Circuit Court of Appeal in *Brown v. Ticor*, 982 F.2d 386 (9th Cir. 1992) and with this Court's decision in *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985).

It is crucial that this Court recognize that this case is not just about professional football. The institutional concerns are enormous, and it is understatement to say that the character of

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[4]The District Court held petitioner, Leslie O'Neal, in contempt for filing a status report in his pending case in federal District Court in Los Angeles. The Court stated that this action violated its injunction of suits in any other forum. See App. pp. 18-25.

[5]The Eighth Circuit opinion, 9 pages long, claimed not to reach the objections set forth in appellants briefs because it found the District Court had jurisdiction over the objectors. Jurisdiction of course does not permit the Court to exceed its authority as set out in the Federal Rules or as circumscribed by the Constitution. Courts have jurisdiction over minority litigants, but the Constitution is supposed to protect certain fundamental rights and restrain even judicial exercise of power. *Yick Wo v. Hopkins*, 118 U.S. 356, 370-74 (1886)(discriminatory application of facially neutral statute violates 14th amendment Equal Protection Clause).

modern, multi-plaintiff litigation is in jeopardy. The Eighth Circuit rule, if permitted to stand, works not only a grievous injustice on Petitioners, but on others similarly situated in all varieties of class action litigation. Quite simply, the future of civil litigation now remains in doubt. The Eighth Circuit rule would not only take away individual property rights which are the bedrock of individual freedom and the democratic heritage in this country, it would encourage the worst possible litigation strategies. If a mandatory class can be certified and sustained over objection and despite pending suits, then the rewards will go to those lawyers who file first in sympathetic jurisdictions. The attorneys who do not move hastily, who consider and carefully evaluate cases, or those who do not feel it is appropriate to activate the class mechanism, will quite simply lose out to the first in line. In fact, as is the case here, individual players who do not seek class certification too may lose their indiviual lawsuits altogether. Furthermore, defendants will be foolish not to encourage the filing of mandatory classes with counsel who are amenable to "reasonable, sweetheart" settlements. Under the Eighth Circuit rule, there is absolutely nothing to check such developments, and indeed they are virtually inevitable.

To deny certiorari here would leave in place an oppressive class action settlement forced on Petitioners over their objection. Certiorari is also necessary to correct an appellate opinion affirming the settlement which claims not to "reach" the federal rules and constitutional issues asserted by Petitioners.

Granting certiorari here will enable this Court to clarify the reach of the due process rights of absent class members recently articulated in *Shutts*, and thereby eliminate a profoundly important uncertainty in the rules of class action litigation. This Court has recently indicated that it is conscious of the importance

of this issue in its opinion withdrawing certification in *Brown v. Ticor* with instructions to the Ninth Circuit to decide the federal rules question before reaching the constitutional question. *Ticor* settled before the issue could be addressed again by the Ninth Circuit. However, class actions are being brought and certified in virtually every district in the country. Certain jurisdictions, such as the Ninth Circuit, have avowed not to abandon traditional, individual constitutional justice in favor of the "representative," albeit undemocratic mechanism of the forced class action advocated by the Eighth Circuit. This Court needs to resolve the conflict among the circuits and define the limits of mandatory class actions which threaten to utterly destroy constitutionally guaranteed property rights held by individual citizens.

The District Court exceeded its authority under the correct and lawful interpretation of the Federal Rules. Further, Petitioners' constitutional due process rights were violated by the denial of their right to opt out, and by the order enjoining prosecution of individual damage actions in other courts. A clear declaration by this Court that Petitioners herein are in fact "absent" class members entitled to the due process projections defined in *Shutts* will restore due process and resolve the existing conflict between the Ninth and Eighth circuits of the federal appellate court system.[6]

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[6]Petitioners also seek review of the Eighth Circuit's affirmance of the District of Minnesota's ruling that Petitioners have waived their objection to jurisdiction by specially appearing to object to the imposition of the mandatory class as well as its obvious unfairness. Petitioners were not adequately represented by class counsel or the class representatives, who negotiated a settlement favorable to themselves by sacrificing the rights of

OPINIONS BELOW

The opinion of the Court of Appeal is reported at 41 F.3d 402 (8th Cir. 1994), and is reprinted in the Appendix at page 2 through 17. The decision of the United States District Court for the District of Minnesota is reported at 836 F.Supp. 1509 (D.Minn. 1993) and is reprinted in the Appendix at pages 26 through 169.

JURISDICTION

The judgment of the Court of Appeals was entered on December 6, 1994. Petitioners timely filed a petition for rehearing, which was denied on January 20, 1995. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISION AND RULE

This Petition arises under the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and under Federal Rule of Civil Procedure Rule 23, 28 U.S.C.

STATEMENT OF THE CASE

This Petition is necessary due to actions by the United States Court of Appeals for the Eighth Circuit which exceed the authority permitted by the Federal Rules of Civil Procedure and

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absent members. The actions taken in the Eighth Circuit are totalitarian and completely without legal authority of ethical justification. It is this Court's responsibility and duty to grant certiorari and rectify this injustice before it spreads and infects other cases and other causes.

which violate Petitioners' constitutional due process rights. Petitioners are present and former football players in the National Football League who, without due process of law, have been deprived of their right to prosecute individual antitrust damages action against the National Football League and its member football teams. The United States District Court for the District of Minnesota unlawfully certified a mandatory, non-opt-out class action for the settlement of all NFL players' antitrust claims against the league and its teams, which included Petitioners within the certified class against their wills and over their objections to the being included and to the jurisdiction of the district court. The Court approved the settlement of the action over Petitioners' objections, and enjoined Petitioners from further prosecution of individual antitrust damages actions against the league and its teams pending in other jurisdictions. The Eighth Circuit deprived Petitioners of their due process rights by affirming the aforesaid orders of the District of Minnesota.

The Eighth Circuit decided the present case in conflict with this Court's precedent in *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985), and in conflict with holdings in other circuits, most notably the Ninth Circuit decision in *Brown v. Ticor*, 982 F.2d 386 (1992). The Eighth Circuit holding introduces uncertainty into the law on the question as to whether constitutional due process requires that un-named, absent plaintiffs be given the right to opt out of a class action settlement foreclosing substantial money damage claims. Review by this Court is necessary to clarify this important issue of construction of Rule 23 and constitutional law.

REASONS FOR GRANTING THE WRIT

I. CONTRARY TO THIS COURT'S PRECEDENT IN SHUTTS, THE EIGHTH CIRCUIT RULED THAT CONSTITUTIONAL DUE PROCESS DOES NOT REQUIRE THAT ABSENT CLASS MEMBERS BE GRANTED THE RIGHT TO OPT OUT OF A CLASS ACTION SETTLEMENT INVOLVING SUBSTANTIAL DAMAGE CLAIMS.

The Eighth Circuit in this case acknowledged Petitioners' contention that "the district court erred in failing to apply the standard set forth by the Supreme Court in *Phillips Petroleum Co. v. Shutts*, which required that 'an absent plaintiff be provided with an opportunity to remove himself from the class by'" opting out, "at least in cases seeking primarily monetary damages." 472 U.S. 797, 811-12 (1985)." Op., App. at p. 12. The Eighth Circuit Opinion conceded that *Shutts* does require opt out rights at least in actions seeking primarily monetary damages. Id.

Inexplicably, the Opinion then misinterprets and eviscerates the holding of *Shutts* suggesting that it applies exclusively to class members who are "absent" solely in the sense of not having minimum contacts with the state. The Eighth Circuit makes an utterly illogical and non-sensical change in the definition of "absent" class member and a distinction without any rational or justifiable difference between absent non-named class members who happen to be state residents and those who are absent non-named class members residing out of state. Once the constitutional concerns of *Shutts* are limited to only out of state absent non-named class members who do not have minimum contacts with the forum, the Eighth Circuit found that petitioners

subjected themselves to jurisdiction by asserting their objections, thereby giving up completely their constitutional right to dispute involuntary inclusion in the class which they had no participation in or control over. To the Eighth Circuit, whatever the reality of the powerlessness and absence of the non-named class member, the fiction will be that jurisdiction is the equivalence of "presence" in the class so as to satisfy due process. "In the present case, however, there exists no absent plaintiff whose due process rights must be protected in this fashion. Rather, each of the objectors was subject to the jurisdiction of the district court." Op., App. at p. 12.

This creative fiction of the Eighth Circuit is purely an end oriented attempt to reach a desired result, without a proper concern for the civil justice system or the development of jurisprudence. No case, law review article, or commentary of any kind which discusses the theory of class actions and their application pro and con, has ever suggested that non-named class members are anything other than "absent." That fact about representative as contrasted with individual actions raises the constitutional dilemma. The issue is whether due process will permit self selected class "representatives" and class counsel to make decisions and overrule the choice of the individual class members. By definition, non-named class members have no standing and no right to even appear before the court in a class action. See, e.g., *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675, 677-80 (8th Cir. 1992). Absent class members do not even know about the action until a notice is served; and with a settlement class, notice only is served after all is virtually over, as was the case here. See generally, *In re Real Estate, etc.*, 869 F.2d 760 (3d Cir. 1989). It is small comfort to non-named class members that the Eighth Circuit has repealed the laws of logic,

and informed them that they were not truly "absent" in the class action, even though they had no voice and no right or ability to participate.[7]

A. The Eighth Circuit reached the constitutional issue in affirming the approval of the settlement.

Despite the Court's pretense of not reaching the due process and Rule 23 issue raised by Petitioners, the act of affirming "the approval of the settlement agreement by the district court," Op. at 8, required that the Eighth Circuit decide this issue. The district court approved a settlement agreement which did certify a non-opt-out plaintiff class. In affirming the district court, the Eighth Circuit placed its imprimatur upon the

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[7]To illustrate the impossibility of any meaningful participation, this Court need only examine the District Court's order granting petitioners motions to intervene, solely for the right to appeal, not to litigate. The Order states:

Based on the court's determination that the overall agreement is fair, reasonable and adequate to the class, the court denies all motions to intervene except to the extent that the movants, other than Mr. Sheridan and the Tice plaintiffs, shall be permitted to intervene as "intervenor-objectors" solely for purposes of preserving their rights to appeal any judgment entered by the court in connection with the Stipulation and Settlement Agreement." App. at p. 285 (footnotes omitted). Further, petitioner Van Waiters never asserted a lack of minimum contacts as he plays for the Vikings. However, there was not one scintilla of difference between his absence from the class and the out of state players. None of them had any right or ability to participate, and in the commonly understood, universal language of class action jurisprudence and scholars, "absent," heretofore, has meant a non-named class member wherever they happen to reside.

certification of such a class.

Neither Rule 23 nor any case authority permits non-opt-out classes based on presence within the state or territorial jurisdiction of the federal court. No case, comment, law review article or practice guide discusses limits on class membership in terms of personal jurisdiction. In practice, no court asks about or notifies absent class members that substantive rights depend on physical location and contact with the jurisdiction in question.

The issue of personal jurisdiction, as opposed to "jurisdiction" in the ultra vires sense, decides only one small preliminary issue for some Petitioners herein. All Petitioners, including those playing for the Minnesota Vikings, raised the more significant legal error that neither Rule 23 nor the Constitution permit a mandatory class certification when substantial money damages are involved. The issue raised in common by all objectors is whether the district judge exceeded the power set forth in the federal rules and acted in a manner consistent with constitutional due process rights by enjoining proceedings in actions other than the one then before the court, in sole reliance on the objectors' involuntary status as mandatory class members.

The Opinion creates an entirely new Eighth Circuit rule with a definition of "absent" that has no precedent in case law or class action jurisprudence. Applied to *Shutts* and to Rule 23 federal class actions, state residents who are non-named class members are subject to an involuntary confiscation of their individual civil claims, while out of state, non-named class members maintain the right to control their individual actions (so long as they do not object). Nothing in *Shutts* or any other case suggests such a distinction or proffers any rationale for such a rule.

B. Contrary to the Eighth Circuit's usage, the term "absent" in class action nomenclature means all class members other than the named class representatives.

It is basic that "absent" class members are all those who are not named plaintiffs in the class suit. All other class members are absent in the sense that they lack any standing before the court and cannot participate in any way in the litigation or negotiation leading up to a settlement. These absent class members, as was the case here, are only informed of any activity after a settlement has been consummated and conditionally approved by the court. It makes not one whit of difference to the constitutional and jurisprudential issues whether the un-named class member has minimum contacts with the jurisdiction or not. Those having such contacts have absolutely no say and the due process concern is equal to that of an out of state objector.

Rule 23 makes no state line distinctions. Rule 23 essentially provides for mandatory class certification in injunctive actions, and non-mandatory class certification where damages are involved. The Comments to Rule 23 do not mention classes structured differently based on contacts with the forum court. This is hardly surprising since such a distinction would ignore the practical realities of class actions. The class representatives in a Rule 23(b)(2) class are the only members with standing to appear before the court or contact class counsel. The absent members are not before the court, and this is true whether the member is physically located in the jurisdiction or not.

Shutts does not define "absent" to mean residing out of state or lacking minimum contacts, but merely absent from court in the sense that the class member is not one of the "named" class representatives. The "absent" class members included residents of all 50 states. 472 U.S. at 799. The existence of Kansas

residents among the absent class members was specifically acknowledged. Id. at 801. If the right to opt out depended on residing out of state (or on lack of minimum contacts) the Court would have needed to articulate a different set of standards for Kansas residents (or for class members who lack minimum contacts). But the *Shutts* Court did not draw any distinction based on residence. It held that a court did have jurisdiction to certify a national class, but that due process required an opt-out. Id. at 811-12. All the *Shutts* class members, in-state and out, had been given the right to .opt out and therefore, the class did not transgress constitutional projections. Id.

The right to opt out recognized in *Shutts* does not depend on whether the objectors are within the jurisdiction of the Court. The right to opt out derives from the fundamental nature of the class action device itself which permits representative suits to be brought on behalf of non-participants in extremely limited circumstances. If the participants do not approve the procedural class mechanism, they have a right to opt out and pursue their individual actions, if the controversy involves money damages.

Shutts generally uses the term "absent" in contrast with the term "named", and the two categories exhaust the field of meaningful "class" nomenclature. *Shutts* did not create any third category to describe class members neither named nor absent, such as "unnamed resident". For example, the *Shutts* Court observes that "[a] plaintiff class in Kansas and numerous other jurisdictions cannot first be certified unless the judge, with the aid of the named plaintiffs and defendant, conducts an inquiry into the common nature of the named plaintiffs' and the absent plaintiffs' claims...." Id. at 809.

The Court further states that due process "requires that the named plaintiff at all times adequately represent the interests

of the absent class members." Id. at 812. Also, in recognizing that the "absent" plaintiffs whose claims may be adjudicated in a class action "may not" have minimum contacts, *Shutts* does not treat "absent" plaintiffs and resident plaintiffs as mutually exclusive. Id. at 811. The Court does consider whether non-resident absent members must have special protections because of their location outside the state, and eventually concludes that because due process requires an opt-out for all absent class members, that provision will satisfy due process concerns for the entire universe.

The use of the term "absent" in the class action context originates from *Hansberry v. Lee*, 311 U.S. 32 (1940). The sole purpose for which *Hansberry* uses the term "absent" is to distinguish between class members present in court and those who are not. Id. at 42-43. There was no territorial jurisdiction issue even implicit in *Hansberry*, which was an Illinois state court case alleging housing discrimination against a putative class of residents of an area within the city of Chicago. Id. at 37-39.

The word "absent" is used four times in the *Hansberry* opinion, each time clearly referring to such putative class members who are not "present" as parties to the litigation. In the first instance, the Court recites the general rule that "one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process ... and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requires." Id. at 40-41. Next, the Court referred to class actions as an exception to the general rule, stating that "members of a class not present as parties to the litigation may be bound by the judgment where ... the relationship between the parties present and those

who are absent is such as legally to entitle the former to stand in judgment for the latter." Id. at 42-43. The two further references to the word "absent" occur in the process of applying the above rules to the facts of the case. Id. at 43-44. A leading class action treatise has an entire chapter entitled "Absent Class Members." Newberg on Class Actions (3d ed. 1992), Chapter 16. The chapter does not discuss territorial jurisdiction or minimum contacts. There is no suggestion in Newberg that the word "absent" has anything to do with geographical boundaries or minimum contacts. There is no precedent for the novel definition of an absent class member created by this Court. The court's use of this incorrect definition of absent class member obviously resulted in an erroneous application of the applicable law.

The Eighth Circuit's determination here that Petitioners "submitted to jurisdiction," besides being erroneous, also does not resolve the issue of whether Rule 23 and the Constitution permit mandatory classes over the objection of non-named absent class members. Given that the Eighth Circuit found Petitioners within its jurisdiction, it was required to, and in fact necessarily did, decide that the Petitioners were not entitled to the opt-out right recognized in *Shutts*. The jurisdictional question may be a first step, but it is only that. In fact, not all Petitioners contested "personal jurisdiction" in terms of minimum contacts, but all objected that the district court did not have the "jurisdiction" in terms of power to impose an involuntary, cram-down class when money damages are involved.

In their Petition for Rehearing, the Petitioners here invited the Eighth Circuit to acknowledge that it did decide the constitutional and Rule 23 issues. Petitioners tried to give the Court an opportunity to offer its rationale for such a rule, to

permit review of the conflicting holdings of the Eighth and Ninth Circuits on the subject with the philosophical and practical considerations set forth. Petn. for Rehrg. 5. In denying the Petition for Rehearing, App. at p. 1, the Eighth Circuit adopted its rule de facto, with no justification or explanation. Given the Eighth Circuit's erroneous and unjust interpretation of the due process clause, and its inability to set forth a cogent rationale for its aberrant reading of class action precedent, this Court should grant certiorari to dispel the uncertainty resulting from the Eighth Circuit's extrordinary new rule.

II. CONSTITUTIONAL DUE PROCESS AND THE FEDERAL RULES REQUIRE THAT ABSENT CLASS MEMBERS BE GRANTED THE RIGHT TO OPT OUT OF A CLASS ACTION SETTLEMENT OF SUBSTANTIAL DAMAGE CLAIMS.

The proper and constitutional use of class suit devices has been the subject of controversy and debate since the concept was originally devised.[8] On the one hand, it is a well-recognized fundamental principle of American jurisprudence that an individual has a right to direct representation and control of legal proceedings which may affect his or her life, liberty, or property. On the other hand, where numerous individuals share largely identical interests, concern for efficiency and expeditious use of judicial resources may support the use of alternatives to traditional case-by-case litigation. Although some commentators, courts, and self-interested litigants, impatient with the sluggishness of old-

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[8]See, for example, Miller and Crump, *Jurisdiction And Choice Of Law In Mandatory Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1 (1986).

fashioned constitutionalstyle justice, favor a subordination of concern for individual fairness and due process to the stated goal of efficiency,[9] the majority of courts, including the this Court, have not relaxed due process requirements in this context.

A. *Hansberry v. Lee*

As early as 1940, the Supreme Court recognized the attraction of the "class suit" in efficiency terms and also its dangers. For example, in the well-known case of *Hansberry v. Lee*, 311 U.S. 32 (1940), the Court held that the res judicata or mandatory effect of a purported class suit involving a restrictive property agreement violated plaintiffs' due process rights.

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process . . . . A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution . . . prescribe[s] . . . and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth

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[9]For example, in evaluating the use of Rule 23 in the mass tort context, Professor Newberg has stated: "The economies of time, effort, and expense of the class device cut across categorical tort lines and ought not to be obscured by the narrow application of circumstances or by undue emphasis on traditional interests in one-to-one litigation." 3 *Newberg Class Actions*, §§ 17.06 (3d ed. 1992); see also Miller, *An Overview of Federal Class Actions: Past, Present and Future*, 45 Fed. Jud. Center (1977).

Amendments requires [sic].

> To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a "class" or "representative" suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it . . .
>
> It is evident that the considerations which may induce a court thus to proceed, despite a technical defect of the parties, may differ from those which must be taken into account in determining whether the absent parties are bound by the decree or..... in ascertaining whether such an adjudication satisfies the requirements of due process and of full faith and credit.

Hansberry, 311 U.S. at 40-42 (citations omitted).

B. *Phillips Petroleum Co. v. Shutts*

This Court's most recent and important pronouncement regarding due process constraints on class actions is found in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). *Shutts* involved a class action suit against a gas company for money damages from delayed interest payments to leaseholders. The leaseholders resided in each of the 50 states, the District of Columbia, and several foreign countries.

In approving class certification under Kansas Statutes Annotated Section 60-223 (1983), similar to Rule 23(b)(3) of the Federal Rules of Civil Procedure, the *Shutts* Court made it clear that due process concerns cannot be sacrificed to the pressures of immediate efficiency.

> If the forum State wishes to bind an absent

> plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel . . . . The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.[10]

Shutts, 472 U.S. at 812 (citations omitted).

C. *Brown v. Ticor*

In *Brown v. Ticor Title insurance Co.*, 982 F.2d 386 (9th Cir. 1992), cert. granted Oct. 4, 1993, cert. withdrawn April 4, 1994, the Ninth Circuit considered due process requirements for Rule 23 settlement classes post-*Shutts* in an antitrust context. Several title insurance holders had brought numerous antitrust

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[10]While *Shutts* dealt with class actions under a Kansas statute, it was modeled on the federal rule. Additionally, it is well settled that due process concerns apply not only to federal courts exercising diversity jurisdiction but also where cases are brought under federal statutes. See *Fraley v. Chesapeake and Ohio Railway Co.*, 397 F.2d 1 (3d Cir. 1968); *Lone Star Package Car Co. v. Baltimore & O. N. Co.*, 212 F.2d 147 (5th Cir. 1954).

actions, in various locations, claiming price fixing agreements among defendants Ticor and other title insurance companies. The litigation was consolidated by the MDL panel in federal court in Pennsylvania where eventually a non-opt-out class was certified pursuant to Rule 23(b)(1) and (b)(2). After certification, a settlement was reached. The Pennsylvania District Court granted preliminary approval of the "non-opt-out" settlement, and the Attorney General of Arizona and others filed separate suits in Arizona. Defendants moved for summary judgment on res judicata grounds in Arizona because the class certification violated due process requirements as set forth in *Shutts*. The court held that:

> In order to bind an absent plaintiff concerning a claim for monetary damages, the court must provide minimal due process. . . . . The Third Circuit held that the MDL 633 litigation was a "hybrid suit that involved the foreclosure of substantial damage claims." *In Re Real Estate*, 869 F.2d 760, 768. We follow the Third Circuit's holding.
>
> According to *Shutts*, minimal due process requires that "an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court," if monetary claims are involved. 472 U.S. at 812, 105 S.Ct. at 2974.

Ticor, 982 F.2d at 392 (some citations omitted).

D. *La Mar v. H & B Novelty & Loan*

The pre-*Shutts* case of *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973), set forth the due process

concerns raised by a free-wheeling use of Rule 23, foreshadowing the language of the Supreme Court in *Shutts*. In *La Mar*, plaintiff sued all pawnbrokers in Oregon on behalf of all customers of pawnbrokers claiming violations of the Truth-in-Lending Act, 15 U.S.C. Sections 1601-1677. The district court certified a plaintiffs' class under Rule 23. In reversing the class certification, the Ninth Circuit highlighted the due process problems of Rule 23.

> The [Advisory Committee's] discussion of Rule 23(b)(3) emphasizes the importance of an application that achieves "economies of time, effort, and expense, and promote[s] uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." 39 F.R.D. 69, 102-103 (1966).

La Mar, 489 F.2d at 465 n.2. "The tone of. . . . [the Committee] note [to Rule 23] is one of prudence and caution." 489 F.2d at 465. The court went on to analyze proper use of Rule 23(b)(1) versus Rule 23(b)(3) class certification.

> Rule 23(b)(1)(A) authorizes class actions to eliminate the possibility of adjudications in which the defendant will be required to follow inconsistent courses of continuing conduct. This danger exists in those situations in which the defendant by reason of the legal relations involved can not as a practical matter pursue two different courses of conduct. The Advisory Committee's Note makes this clear in discussing Rule 23(b)(1)(A) by its reference to actions to declare bond issues invalid, to fix the rights and

> duties of a riparian owner, and to determine a landowner's rights and duties respecting a claimed nuisance.
>
> Infrequently, if ever, will this be the case when the action is for money damages.

La Mar, 489 F.2d at 466.

E. *In Re Greenman Securities Litigation*

The Eleventh Circuit in a post-*Shutts* case involving complex securities issues, *In Re Dennis Greenman Securities Litigation*, 829 F.2d 1539 (11th Cir. 1987), considered the issue of mandatory class certification. *Greenman* involved allegations of fraud, violations of various securities acts, and R.I.C.O. counts against Greenman, a broker, Merrill Lynch, Paine Webber, and Barclay. A number of investors filed suit. The individual suits were enjoined and a class action was certified under 23(b)(1). Id. at 1541. After reviewing the district court's finding, the Eleventh Circuit reversed the 23(b)(1) certification, expressly commenting on the due process concerns:

> Members of a (b)(3) class, but not those of a (b)(1) class, may choose to opt out and not be bound by the judgment. ... These practical differences affect the ability of plaintiffs to bring class actions as well as their attractiveness to defendants. Applying the various subsections of Rule 23(b) requires a balance between an individual's due process rights and the judiciary's need to expedite the orderly resolution of conflict. ...
>
> The identity of judicial action that creates "inconsistent or varying adjudications" [under Rule 23(b)(1)] is not clear. Many courts

> confronting the issue have held that Rule 23(b)(1)(A) does not apply to actions seeking compensatory damages. ... Underlying is the concern that if compensatory damage actions can be certified under Rule 23(b)(1)(A), then all actions could be certified under the section, thereby making the other sub-sections of Rule 23 meaningless, particularly Rule 23(b)(3). ...
>
> [T]he Advisory Committee Notes support the proposition that (b)(1)(A) certification is for cases seeking injunctive and declaratory relief. ... Advisory Committee Note to the 1966 Revision of Rule 23, 39 F.R.D. 69, 100 (1966). Since the plaintiffs sought compensatory damages, the district court erred by certifying the class pursuant to (b)(1)(A).

Greenman, 829 F.2d at 1544-45 (some citations omitted).

F. *Keene v. Fiorelli*

Recently, the Second Circuit in *Keene v. Fiorelli*, 14 F.3d 726 (2d Cir. 1993), vacated Judge Weinstein's order issuing a preliminary injunction and certifying a mandatory limited-fund class under 23(b)(1)(B). Keene sought a mandatory settlement of all claims by present or future asbestos claimants and alleged it was a limited fund. Although the court based its ruling on Article III grounds, it commented on the risks of mandatory class settlements.

> [C]lass members in cases such as this would have no say in the conduct of the court-appointed class representatives and, unlike creditors in bankruptcy, are not able to vote on a settlement. See 11 U.S.C. § 1126. For them, it would be

> "cram-down" from start to finish. Finally, unlike a lawyer for a creditors' committee, the class representatives in matters like the present one may not be compensated unless a settlement is reached, a situation fraught with danger to the rights of plaintiffs.

Keene, 14 F.3d at 732.

G. *Reynolds v. NFL*

There have been a few court's that have certified without serious explanation or justification mandatory classes where some money damages relief was sought. This was a pre-*Shutts* hallmark of cases involving sports. For example, in *Reynolds v. NFL*, 584 F.2d 280 (8th Cir. 1978), the Eighth Circuit approved certification of the *Alexander* 23(b)(1) class rather than a 23(b)(3) class, principally citing *Robertson v. National Basketball Association*, 556 F.2d 682 (2d Cir. 1977). Even before *Shutts*, *Reynolds* was criticized for its implicit assumption that athletes (as contrasted with airline stewards, for example) did not have individual due process rights. Cf. *Airline Stewards and Stewardesses Ass'n, Local 550 v. American Airlines*, 490 F.2d 636 (7th Cir. 1973), cert. denied, 416 U.S. 993 (1974), with *Reynolds v. National Football League*, 584 F.2d 280 (8th Cir. 1978). As one commentator stated:

> [I]n *Reynolds v. National Football League*, the appellate court rationalized that the antitrust suit seeking injunctive and monetary relief had properly been certified as a (b)(1) or (b)(2) class suit. Therefore, the retired football players had no absolute power to opt out and were bound by a monetary settlement of their antitrust claims, when their appellate attack on

> the adequacy of representation and fairness of the settlement failed. There is good reason to question the *National Football League* result. Granting that the restructuring of the league required a mandatory settlement as to the future, thus overriding the absolute right of an individual player or player group not to be bound, nevertheless, the settlement of individual past damages claims should have been subject to Rule 23(b)(3), allowing individuals, particularly retired players, to opt out. This was a proper case for bifurcating the issues between Rule 23(b)(1)-(2) and (b)(3) . . . .

Kennedy, *Class Actions: The Right to Opt Out*, 25 Ariz. L. Rev. 3, 60-61 (1983). See also *United States v. Allegheny - Ludlum Indus., Inc.*, 517 F.2d 826 (5th Cir. 1975); *Johnson v. General Motors Corp.*, 598 F.2d 432 (5th Cir. 1979); *Crowder v. Lash*, 687 F.2d 996 (7th Cir. 1982).

III. THE 8TH AND 9TH CIRCUITS ARE IN DIRECT CONFLICT OVER CERTIFICATION RULES FOR CLASS ACTIONS INVOLVING SUBSTANTIAL MONEY DAMAGES.

The district court in this case took pains to try to limit the consequences of its decision to these football players. However, in view of the Eighth Circuit Opinion, a direct conflict now exists between the present case and the holding of the Ninth Circuit in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), on the permissibility of a non opt-out class where substantial money damages are involved. In contrast to the Eighth Circuit's affirmance of a non opt-out class in an action seeking substantial

damages, the Ninth Circuit in *Ticor* held that an absent, non-named plaintiff has a constitutional due process right to opt out of a class settlement involving "foreclosure of substantial damage claims." Id. at 392..

As in *Shutts*, the right to opt-out of the damages settlement in *Ticor* did not depend on whether the objectors had submitted to the personal jurisdiction of the class action court. Territorial jurisdiction was irrelevant in *Ticor*, as twelve class actions were consolidated in the Pennsylvania district court by the Multidistrict Litigation Panel. Id. at 380. The Court uses the term "absent plaintiff" to refer to class members other than those represented by the class counsel in the MDL proceedings. Id. at 392. Thus, in affirming the certification of a non opt-out class settlement of substantial damage claims, this Court's opinion in the present case stands in direct conflict with the holding in *Ticor*.

IV. PETITIONERS DID NOT WAIVE THEIR OBJECTIONS TO THE DISTRICT COURT'S ASSERTION OF JURISDICTION OVER THEM.

Taken together, the decisions in *International Shoe v. State of Washington*, 326 U.S. 310 (1945), *Hansberry v. Lee*, 311 U.S. 32 (1940), and *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985), define the two bases under which a court may exercise personal jurisdiction over unnamed class members. The first is when the class member has minimum contacts with the forum. *International Shoe*, 326 U.S. at 319. The second is when, under *Shutts*, the class member is given the opportunity to opt out and is provided with adequate representation by the class representatives. *Shutts*, 472 U.S. at 810. It is clear from *Shutts* that the absence of either the opportunity to opt out or adequate representation deprives the court of in personam jurisdiction over

absent class members. Consequently, in objecting to jurisdiction Petitioners here could and did properly argue in the context of this class action that they did not have minimum contacts with the forum, that the absence of the right to opt out denied them their due process rights, and that the representation of the class representatives and class counsel was inadequate. All of the arguments presented by Petitioners and claimed by the NFL and named plaintiffs to be "to the merits" were clearly addressed to the adequacy of representation issue. Since the absence of adequate representation defeats jurisdiction, to hold that discussion of matters touching upon the adequacy of representation constitutes waiver of any objections to jurisdiction makes no sense whatsoever, and there accordingly is no sound basis for asserting that Petitioners herein ever waived their objections to the District Court's assertion of in personam jurisdiction over them.[11] Id.

Petitioners have carefully confined themselves to arguing jurisdictional issues. As recognized in *Shutts*, adequate representation of the interests of absent class members is required "[i]f the forum State wishes to bind an absent plaintiff concerning a claim for money damages...." Id. at 812. Thus, adequate

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[11]Similarly, Mr. O'Neal's appearance to show cause why he should not be held in contempt cannot properly be deemed acceptance of the jurisdiction of the court and waiver of all jurisdictional objections. It would be grossly unfair to require Mr. O'Neal to choose between the waiver of his objections to the District Court's jurisdiction and properly defending himself against the charge that he has acted in disregard of the Court's authority and dignity. It is exactly because of his respect for that court and the judicial process that he has taken all of his actions, including his special appearance in connection with the contempt proceedings.

representation is not merely a prerequisite for settlement approval, but also to the court's exercise of personal jurisdiction over otherwise absent class members.

Particularly in a class action filed for the sole purpose of securing judicial approval of a settlement already reached, as here, it is wholly illogical to assert that pointing out the special treatment of named plaintiffs under the settlement and their failure to fairly treat absent members' rights waives jurisdictional objections. In contrast to a case that will be litigated, where the proposed settlement has been substantively concluded before the court is asked to certify the class, the adequacy of representation issue can only be evaluated by reference to the proffered settlement. If otherwise absent class members were unable to bring to the attention of the court the specially favorable treatment the named plaintiffs have negotiated for themselves alone, there would exist no party to the proceedings motivated to disclose the failure of adequate representation implicit in such favoritism.

In *Shutts* this Court spelled out the prerequisites that must be met before a court may assert jurisdiction over an absent plaintiff in a class action seeking to resolve substantial money damages claims. In addition to the right to opt out, these include an opportunity to present objections and challenge the adequacy of the representation. Raising these objections cannot under an equitable system result in the "Catch 22," that an absent class members rights are thereby voided. Such a rule is unworthy of this Court or the constitutional justice system. Concerns for uninterrupted Monday night football may or may not be serious, but they do not excuse the dismantling of constitutional protections of individual rights that most scholars have long understood to be inviolate.

CONCLUSION

Petitioners have a constitutional right to opt out of any plaintiff class certified for money damages and a correct interpretation of Rule 23 precludes certification of a mandatory class in such circumstances. Accordingly, they seek a Writ of Certiorari for review of the Eighth Circuit's Opinion and holding in this case which should be granted. Denying certiorari would leave in place a grievous injustice and an aberrant rule of law that introduces uncertainty and inequity into the important field of class action damages litigation.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on April 18, 1995, I served the within *Petition For Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 18, 1995, Los Angeles, California.

_____

Betty J. Malloy
(*Original Signed*)